NO. 85-420 (8)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARY BRICK, successor to JOHN BRICK,

Petitioner,

v.

ALAN McSURELY and MARGARET McSURELY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CROSS-PETITION

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Question Presented

Whether the Speech or Debate clause bars a judgment for damages against a Senate aide for invasion of privacy committed in the course of returning to their owner papers that he had taken in the first instance without subpoena or other lawful process.

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ARGUMENT

The government has filed a contingent cross-petition to review the affirmance by the court of appeals of the privacy award of $21,000 against Brick for the "manifestly excessive means" he used in returning respondents' documents to them. It urges that the court erred in not clothing Brick with immunity under the Speech or Debate clause because he "was performing, pursuant to arrangements made by his superiors in the subcommittee, a necessary step in an ongoing congressional investigation. It would be anomalous to characterize Brick's role in returning the documents as outside the scope of his legislative duties as a subcommittee investigator when his role in obtaining the documents is the first

place was part of those duties" (Cross-Pet. 7).

The significance of the government's cross-petition is that it should remove any doubt as to the need for this Court's granting the petition in No. 85-241 so that it may put an end to the gross misinterpretation of the Speech or Debate Clause which pervades the opinion below.

The government's position on its cross-petition is identical with its position in its Brief in Opposition to the petition in No. 85-241 attempting to ignore the clear line of demarcation drawn by this Court between conduct that is merely related to the legislative process and conduct that is a legislative act (P. 22-23). The government's position conflicts head on with Gravel v. United States, 408 U.S. 606 (1972) and Dombrowski v. Eastland, 387 U.S. 82 (1967), which established that

investigatory activity conducted without benefit of subpoena, though it may be related to a legitimate investigation, does not immunize members of Congress or their aides who violate law in conducting the investigation. In Gravel the Court stated explicitly that members of Congress would not be "immune" if "in order to secure information for a hearing [they] themselves seized the property or invaded the privacy of a citizen. 408 U.S. at 621. In that case a legislative aide was not immunized from a grand jury subpoena seeking out the source of classified documents which came into a Senator's possession. In Dombrowski, despite the claim of Speech or Debate immunity, the Court remanded for trial a charge that a Senate employee had engaged in a raid which violated fourth amendment rights. The government's refusal to acknowledge the force of these cases that

are precisely in point emphasizes the need for this Court's acceptance of the petition No. 85-241 so as to put an end to the obfuscation of this important area of law.

The consequences that would ensue if Gravel and Dombrowski were not the law of the land are appalling to contemplate. Members of Congress and their staff aides, numbering some 15,000 (Pet. in No. 85-241, 29), would be free of all restraints in conducting investigations so long as they claim, however, tenuously, that the investigation had been authorized and pertain to a matter on which legislation may be had. They could bribe, blackmail, and burglarize or torture with impunity. (Pet. in No. 85-241, 26).

The extreme position of the government is perfectly revealed in the facts of this particular case. The Department

of Justice is literally claiming legislative immunity when a legislative aide as part of his informal legislative activities reveals to a husband the premarital sexual history of his wife!

This Court should not review the one issue on which the court below reached a correct result (even if, for the wrong reasons, as we pointed out in our Petition in No. 85-241 at 31-33), though there is a clear need to review the remaining portions of the opinion.

Conclusion

The cross-petition for certiorari should be denied.

Respectfully submitted,

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